THE RIGHTS OF MANUFACTURERS IN MALAYSIA UNDER THE INDUSTRIAL CO-ORDINATION ACT 1975

PART II

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JUDICIAL CONTROL OF ICA UNDER ADMINISTRATIVE LAW

If an aggrieved manufacturer, new or established, cannot obtain a remedy on constitutional grounds against the Government he may nevertheless be able to establish a case against the licensing authority or Minister on the grounds that the conduct of the authority in question does not comply with principles of administrative law. Over the years the courts have evolved principles on the basis of which they will intervene to ensure that the executive limb of Government does not act unfairly in carrying out its duties under powers conferred upon it by legislation. An administrative body must take care not to step outside the minimum standards of what the courts will regard as fair conduct. The principles upon which the courts will intervene change in response to the demands and needs of society, particularly in England and Australia. Malaysian courts must be equally alive to the trends in Malaysian society and take up the challenge to protect society from the excesses resulting from exercise of administrative powers. In England and Australia at least "there has been, somewhat belatedly, a recognition by judges, and even by parliamentarians, that the doctrine of ministerial responsibility to parliament does *not* provide the safeguards for the citizen that it was so often alleged to provide. It is claimed nowadays that party authoritarianism has replaced parliamentary democracy, but even if it was ever true that the parliaments maintained continuous review and control over administrative action it has certainly not been true for the past 50 years".[90]

The common law principles upon which the Malaysian courts will act in controlling an abuse of administrative powers are essentially the same as those applied in England and Australia. What is needed from the Malaysian courts is a more bold and activist approach in the application of these principles as has happened in England and Australia. Even though the Malaysian courts may adopt a low profile and conservative approach in the application of the common law principles of judicial review of administrative actions nevertheless the more blatant excesses that could occur under the ICA must certainly be checked by the courts. Indeed such excesses could fall squarely within the most narrow expressions of the common

[90] Whitmore and Aronson, *Review of Administrative Action* (Law Book Co. Ltd., Sydney, 1978), at pp. 30-31.

law principles governing the matter. In saying this, it is not suggested that the powers under the ICA will be exercised or are being exercised indiscriminately without regard to the law. However, the danger of that happening is ever present in view of the sweeping powers conferred on the licensing authority by the vague terminology of the ICA.

It is outside the scope of this article to consider in detail all the various grounds in administrative law on the basis of which the conduct of the licensing authority and the Minister could be challenged.[91] Besides, the application of each ground would depend on the nature of the conduct complained of. All that can usefully be done in the present context is to discuss some of the general principles which the licensing authority and the Minister must bear in mind when taking action under the various provisions of the ICA. If these principles are not complied with then the action of the administrative body may be challenged in court and be quashed by a writ of *certiorari* and be ordered to be done properly by a writ of *mandamus.*[92]

Improper Purposes or Motives

The conduct of the licensing officer may be challenged on the ground that he has acted in excess of jurisdiction because his conduct was based on improper purposes or improper motives or both. This conduct may take the form of refusal to grant a licence, the imposition of onerous conditions, the variation of conditions previously imposed which incur the manufacturer in greater expense, or the revocation of a licence.

In the case of improper purposes the challenge will be on the ground that the action of the licensing officer is based on objectives not encompassed by the ICA whereas the challenge on the ground of improper motives is based on bad faith on the part of the licensing officer. This latter ground is more difficult to establish as it involves producing evidence of the subjective state of mind of the licensing officer or his delegates.

It is now well established that the courts will review administrative actions on these grounds. For example, in the context of town plan-

91 For detailed discussions of administrative law principles see for e.g. *ibid,* or S.A. de Smith, *Judicial Review of Administrative Action* (Stevens & Sons Ltd., London, 3rd edn., 1973), or Schwartz and Wade, *Legal Control of Government* (Clarendon Press Oxford, London, 1972), or H.W.R. Wade, *Administrative Law* (Clarendon Press, Oxford, 4th edn., 1977).

92 "In past days it could be claimed that the principles of review could only be understood in the context of the special remedies — which were for all practical purposes the prerogative writs of *certiorari, mandamus,* prohibition, *habeas corpus* and *quo warranto.* Modern developments ... have transformed the position. Some of the remedies, notably *certiorari* and *mandamus,* still retain some unnecessary technical accretions, and *habeas corpus* is perhaps *sui generis,* but the general situation is that an applicant for review will rarely fail because he has chosen the wrong remedy. Judicial activity has freed the prerogative writs from the worst of the technical restrictions and boosted the effectiveness of the remedies of injunction and declaratory judgment." *Op. cit.* n. 90 at p. 39.

ning conditions, Lord Denning in *Pyx Granite Co. Ltd.* v. *Minister of Housing and Local Government* said:[93]

> The principles to be applied are not, I think, in doubt. Although the planning authorities are given very wide powers to impose 'such conditions as they think fit', nevertheless the law says that those conditions, to be valid, must fairly and reasonably relate to the permitted development. The planning authorities are not at liberty to use their powers for an ulterior object, however desirable that object may seem to them to be in the public interest.

The purposes that the licensing officer is directed to take into account are specified in section 4(3) of the ICA:

> The licensing officer shall, in deciding whether an application for a licence should be approved or refused, consider whether the issue of a licence is consistent with *national economic and social objectives and would promote the orderly development of manufacturing activities in Malaysia.*

Section 4(4) authorises the licensing officer to impose such conditions "as he may think fit" in furtherance of the above objectives.

The objectives enumerated in section 4(3) of the ICA are very wide and vague. National economic and social objectives can change from time to time depending on prevailing domestic and international economic conditions. What is really needed is a precise enumeration of those objectives in the statute itself, or failing that, a reference to a document in which they are stated. It is submitted that the objectives referred to in section 4(3) are long-term objectives rather than policies formulated to meet day-to-day problems of economic and social management. There is little doubt that the courts must have recourse to the Second and Third Malaysia Plans for a statement of the long-term national economic and social objectives. All planning and economic development in the country at present is geared to implementing these plans. The Second Malaysia Plan (SMP) declares what the national economic and social objectives are:[94]

> The Plan incorporates a two-pronged New Economic Policy for development. The first prong is to reduce and eventually eradicate poverty, by raising income levels and increasing employment opportunities for all Malaysians, irrespective of race. The second prong aims at accelerating the process of restructuring Malaysian society to correct economic imbalance, so as to reduce and eventually eliminate the identification of race with economic function. This process involves the modernisation of rural life, a rapid and balanced growth of urban activities and the creation of a Malay commercial and industrial community in all categories and at all levels of operation, so that Malays and other indigenous people will become full partners in all aspects of the economic life of the nation.

The main thrust of Government policy as regards industrial development is expressed as follows:[95]

> Greater participation by Malays and other indigenous people in manufacturing and commercial activities is a fundamental objective of the

93 [1958] 1 Q.B. 554 at p. 672. This statement has been approved by the House of Lords in *Chertsey U.D.C.* v. *Mixnam's Properties Ltd.* [1965] A.C. 735. A similar view has been expressed by the Australian High Court in *Allen Commercial Constructions Pty. Ltd.* v. *North Sydney Municipal Council* (1970) 123 C.L.R. 490.

94 Second Malaysia Plan 1970-75, Para. 2.

95 *Ibid.* para. 496.

> Plan. Such participation applies to ownership and management as well as employment. The Government has set a target that within two decades at least 30% of the total commercial and industrial activities in all categories and scales of operation should have participation by Malays and other indigenous people in terms of ownership and management.

The licensing officer under the ICA must at all times keep sight of these objectives. It is clear that he can take a whole multitude of considerations into account in deciding whether or not to grant a licence and what conditions to impose in the licence. But he must not act on extraneous considerations.

It is also clear that he can impose a wide range of conditions in the licence. However, what he cannot do is impose conditions that are manifestly designed to drive that manufacturer out of business or so as to discriminate against one manufacturer. In such a situation not only will the manufacturer be able to seek a writ of *certiorari* from the courts but if he is in fact driven out of business he might be able to obtain compensation from the Government for breach of Article 13(2) of the Federal Constitution.[96]

The grounds for refusal of a licence to a new manufacturer are more likely to be based on the second limb of the objectives stated in section 4(3) of the ICA. This purpose may include grounds such as the fact that there are already several manufacturers in the field, that the proposal is not in keeping with the aims of industrial development in the country, *e.g.* with regard to use of local raw materials Or local equity participation. It would in fact be very difficult for an aggrieved manufacturer to challenge an exercise of the discretion by the licensing officer under section 4(3) and (4). The discretion is so wide that it enables the licensing officer to impose conditions which will interfere with the normal running of the business, *e.g.* that marketing rights be granted to a specific body; the raw materials produced by a certain body be used; or that the transport services of a specified person be used. Yet all of these will fall within the national economic and social objectives of the country. It is this type of potential use of the powers and discretions vested in the licensing officer that worry the business community.

Natural Justice

The principles of natural justice dictate that "an adjudicator be disinterested and unbiased (*nemo judex in causa sua*) and that the parties be given adequate notice and opportunity to be heard (*audi alteram partem*)."[97] The application of the principles of natural justice can arise under the ICA where the licensing officer is considering the application for a licence, the imposition of conditions in that licence or the variation of conditions already imposed or the revocation of a licence.

The first aspect of the principle of natural justice is principally applicable to persons carrying out a judicial function when a decision

[96] See *supra* pp. 208-224.
[97] S.A. de Smith, *Judicial Review of Administrative Action* (Stevens & Sons Ltd., London, 3rd edn., 1973), at p. 134.

has to be made on the basis of law and fact. It is more difficult to import the maxim *nemo judex in causa sua* where administrative functions are carried out. However, an administrator can be required not to put himself in a situation where there is a conflict between his duty and his personal interests. Thus the licensing officer or his officers must not have a pecuniary interest in the venture in respect of which the licence is sought.

It is the second limb of the principle of natural justice that has greater application to the licensing officer. There is no express requirement in the ICA that an applicant be given an opportunity to be heard before the licensing officer arrives at his decision. The view of textbook writers is that where a decision is concerned with the allocation of scarce resources and there are a large number of applicants and a policy element is involved in the making of the decision then perhaps the highest standards of the *audi alteram pattern* rule may be substituted for a lower standard of fairness. The licensing authority must give fair consideration to the materials it has before it and provide a reasonable opportunity to the applicant to make representations to it.[98]

However, different considerations apply where the licensing officer decides to vary the conditions in the licence or to revoke it. Section 4(4) of the ICA provides that the licensing officer may vary conditions imposed in the licence "on the application of the manufacturer or on the licensing officer's own motion after consultation with the manufacturer in respect of whom the conditions in the licence are to be varied". The provision therefore imposes a positive duty of the licensing officer to consult the manufacturer before the conditions are varied. Consultation connotes that the manufacturer must be given an opportunity to make representations.

In the case of revocation of a licence section 6(2) of the ICA provides:

> Before exercising his power to revoke a licence the licensing officer *may* call upon the manufacturer to show within such period as may be prescribed due cause why his licence should not be revoked.

Although the provision uses the permissive term "may" it is submitted that it should be interpreted as "must".

The variation of terms already imposed in a licence or the revocation of a licence result in far more serious consequences for the manufacturer concerned than the refusal to grant a licence to a new manufacturer. The revocation of the licence withdraws from the manufacturer his right to carry on his business as a consequence of which he may lose his livelihood and incur losses of property. The same result could follow if the conditions of the licence are varied to such an extent that compliance with the conditions becomes com-

98 See *ibid,* at pp. 158-159; Whitmore and Aronson, *Review of Administrative Action* (Law Book Co. Ltd., Sydney, 1978), at pp. 78-79. In *R.* v. *Gaming Board for Great Britain, ex.* p, *Benaim and Khaida* [1970] 2 Q.B. 417 Lord Denning M.R. considered whether the Gaming Board had acted "fairly" in arriving at its decision to refuse permission to apply for a licence.

mercially impossible. Regardless of the terms of the ICA there ought to be a strong presumption that prior notice and opportunity to be heard should be given before a licence can be revoked. It should be especially strong where revocation causes deprivation of livelihood or serious pecuniary loss, or is dependent on a finding of misconduct.[99]

There is Privy Council authority [1] for the view that a licence is merely a privilege and therefore it can be revoked without any need to comply with the *audi alteram partem* rule so long as the licensing authority acts on reasonable grounds. A distinction was drawn by the Privy Council between procedures which are judicial in nature and executive actions which are taken to withdraw a privilege. The *audi alteram partem* rule was said to apply only to the former. This decision has been criticised by later cases of the highest authority. The distinction between proceedings in the nature of judicial proceedings and the withdrawal of a privilege is often difficult to draw. The consequences of the withdrawal of a so-called privilege are often dire. Lord Reid in *Ridge* v. *Baldwin*[2] strongly criticized the decision and said that

> nothing short of a decision of this House directly in point would induce me to accept the position that, although an enactment expressly requires an official to have reasonable grounds for his decision, our law is so defective that a subject cannot bring up such a question for review however seriously he may be affected and however obvious it may be that the official acted in breach of his statutory obligation.

In *R.* v. *Gaming Board,*[3] Lord Denning[4] referred to *Ridge* v. *Baldwin*[5] and expressly stated that the *Nakkuda Ali*[6] case can no longer be regarded as authority for the proposition that the principles of natural justice do not apply to the grant or revocation of licences.

Even if the distinction drawn in the *Nakkuda Ali* case can be justified not every licence can be regarded as a mere privilege. In *Banks* v. *Transport Regulation Board (Victoria)*[7] Barwick C.J. in the High Court of Australia held that a licence granted to run a taxi-cab was in the nature of property.[8] His Honour took the point that the licence provided the means of the livelihood of its holder. He further emphasised that this was a statutory licence. "I do not think such a licence can be equated to the mere grant of a permission by a private person in respect of his own property."[9] The Chief Justice then went on to state that the decision in *Nakkuda Ali* was erroneous.[10]

It is submitted that the rationale adopted in *Bank's* case applies equally to licences under the ICA. Licences granted under the ICA

99 S.A. de Smith, *ibid.* at p. 197. See also Whitmore & Aronson, *ibid.,* at p. 78.
1 *Nakkuda Ali* v. *Jayaratne* [1951] A.C. 66.
2 [1963] 2 All E.R. 66 at pp. 79-80.
3 [1970] 2 Q.B. 417.
4 *Ibid,* at p. 430.
5 *Op.cit.* n. 2.
6 *Op.cit.* n. 1.
7 (1968) 119 C.L.R. 222.
8 *Ibid.* at pp. 232-233.
9 *Ibid.* at p. 231.
10 *Ibid,* at p. 234.

ought to be regarded as being in the nature of property, in which case there is no reason why the Malaysian courts should feel bound to follow the Privy Council decision in *Nakkuda Ali*.

In *Durayappah* v. *Fernando* [11] Lord Upjohn, delivering the judgement of the Privy Council, expressed reservations about the criticisms of Lord Reid in *Ridge v. Baldwin* against the *Nakkuda Ali* case.[12] Lord Upjohn then went on to enunciate three matters that ought to be kept in mind when deciding whether or not the principles of natural justice ought to apply in a given situation.

> These three matters are: first what is the nature of the property, the office held, status enjoyed or services to be performed by the complainant of injustice. Secondly, in what circumstances or on what occasions is the person claiming to be entitled to exercise the measure or control entitled to intervene. Thirdly, when a right to intervene is proved, what sanctions in fact is the latter entitled to impose on the other. It is only on a consideration of all these matters that the question of the application of the principle can properly be determined.[13]

These three matters apply to a revocation of a licence under the ICA. It is urged that the Malaysian courts do not hesitate in requiring high standards of compliance with the *audi alteram partem* rule to ensure that conditions in licences granted under the ICA are varied or such licences are revoked only in situations where there is no doubt as to the fairness of the conduct of the licensing officer.

The licensing authority must also take cognizance of the relationship between the principles of natural justice and acting on the basis of predetermined policy. The general policy-lines along which the licensing authority must act are specified in section 4(3) of the ICA. In carrying out the policy specified therein, detailed policy rules may have been worked out which best achieve national economic and social objectives and promote the orderly development of manufacturing activities. These include such matters as local equity participation, the use of local raw materials, protection of existing industries etc.[14] However, what the licensing authority must not do is to apply arbitrarily without variation these policy rules without first allowing the applicant an opportunity to make representations in favour of relaxation or alteration of the rules in his particular case.[15]

> The general rule is that anyone who has to exercise a statutory discretion must not 'shut his ears to an application'. I do not think there is any great difference between a policy and a rule. There may be cases where an officer or authority ought to listen to a substantial argument reasonably presented urging a change of policy. What the authority must not do is to refuse to listen at all. But a Ministry or large authority may have had to deal already with a multitude of similar applications and then they will almost certainly have evolved a policy so precise that it could well be called a rule. There can be no objection to that, provided the authority is always willing to listen to anyone with something new to say — of course I do not mean to say that there need be an oral hearing.[16]

11 [1967] 2 All E.R. 152.
12 *Ibid.* at p. 156.
13 *Op.cit.* n. 11 at p. 156.
14 See *supra* p. 201.
15 See Bankes L.J. in *R.* v. *Port of London Authority* [1919] 1 K.B. 176 at p. 184.
16 *Per* Lord Reid in *British Oxygen Co. Ltd.* v. *Minister of Technology* [1971] A.C. 610 at p. 625.

Exclusion of Judicial Review

The ICA as originally enacted did not contain any administrative procedures enabling a manufacturer aggrieved by a decision of the licensing authority to appeal. This shortcoming was remedied by the 1977 amendments. Whilst there is now a right to appeal to the Minister, the decision of the Minister is declared as being "final and shall not be questioned in any court."[17] Two observations may be made about this provision. First, it only purports to oust the jurisdiction of the courts in those areas where the Minister can entertain an appeal and has in fact delivered a decision. Therefore the jurisdiction of the courts is not affected when an application is made to the courts on grounds other than those contained in section 13(1) of the ICA.

Secondly, there is little doubt that the words excluding the jurisdiction of the courts are ineffective in achieving that result. The courts are extremely zealous in guarding against encroachments of their jurisdiction. Ouster of jurisdiction clauses are invariably read down so as to preserve the courts' right to review administrative decisions. A recent authority in point is *Anisminic Ltd.* v. *Foreign Compensation Commission* [18] in which the House of Lords unanimously held that a provision in the statute which provided that a determination of the administrative body "shall not be called in question in any court of law" was not effective in precluding the courts from reviewing it. The excuse used by the courts in justifying their intervention is "excess of jurisdiction" by the administrative body.

> It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word 'jurisdiction' has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decisions on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly. I understand that some confusion has been caused by having said in *Reg.* v. *Governor of Brixton Prison, Ex parte Armah* [19] that if a tribunal has jurisdiction to go right it has jurisdiction to go wrong. So it has, if one uses 'jurisdiction' in the narrow original sense. If it is entitled to enter on the inquiry and does not do any of those things which I have mentioned in the course of the proceedings, then its decision is equally valid in certain circumstances to correct an error of law.[20]

17 ICA s. 13(2). See *supra.*
18 [1969] 2 W.L.R. 163.
19 [1968] A.C. 192 at p. 234.
20 *Per* Lord Reid *op.cit.* n. 18 at p. 170.

Some reluctance has been expressed by the High Court, States of Malaya, in accepting the approach ennunciated by the House of Lords in the *Anisminic* case. In *Mak Sik Kwong* v. *Minister of Home Affairs, Malaysia (No. 2)*[21] Abdoolcader J. preferred to follow the decision of the Privy Council in *Colonial Bank of Australasia* v. *Willan.*[22] The principle expressed by the Privy Council in that case is that a "no *certiorari"* clause in a statute precludes the courts from reviewing the decision of the administrative body and granting *certiorari* against it "except upon the ground either of a manifest defect of jurisdiction in the tribunal that made it, or of the manifest fraud in the party procuring it."[23]

> Mr. Mohideen in his final reply submits that the decision of the Privy Council in *Colonial Bank of Australasia* v. *Willan* now must be considered as qualified by *Anisminic Ltd.* v. *Foreign Compensation Commission.* I am astounded, to say the least, at the proposition so flagrantly flung in the face of the doctrine of *stare decisis* in the hierarchy of our Courts that a decision of the House of Lords, let alone *obiter dicta* at that, can be held to qualify, undermine or indeed virtually purport to overrule a decision of the Privy Council.[24]

The particular matter with which Abdoolcader J. appears to be preoccupied is the phrase "manifest defect". His Lordship pursues this matter and explains what "manifest defect" means in a latter case. *Chan Siew Kim* v. *Woi Fung Sheng Tim Medical Store.*[25]

> Section 15(1) of the (Control of Rent Act 1966) provides for an appeal to the Appeal Board by any person aggrieved by the decision of the Rent Tribunal, and further provides that any decision made thereon by the Appeal Board shall be final and shall not be questioned by any court. The effect of this statutory provision — a privative or ouster clause contradistinctive to mere finality, a difference at times not sufficiently realised or appreciated as to its operative influence in regard to the availability of *certiorari* and the restricted ground therefor in the case of the former — is purportedly to take away the right to *certiorari,* and the counsel on both sides agree, applying and following my judgment in *Mak Sik Kwong* v. *Minister of Home Affairs (No. 2),* that *certiorari* would not however, notwithstanding the privative formula in section 15(1) of the Act, be precluded if there is in fact a manifest defect of jurisdiction in the authority that made the decision or manifest fraud in the party procuring it. The question of manifest fraud does not of course arise in these proceedings.
>
> I would for good measure just add, in briefly summarising the effect of a privative clause such as this, that if a statute provides that an order made by an authority acting under it shall not be questioned in any court, all that is necessary to oust the jurisdiction of the courts is that the authority should have been constituted as required by the statute with jurisdiction in the matter, the parties to the proceedings should be subject and amenable to its jurisdiction, the jurisdiction should be exercised on the grounds mentioned in the statute, and the order made should be within the terms of the statutory provisions. These conditions being satisfied, the ouster is complete even though in applying the provisions of the statute some omission or irregularity not amounting to or resulting in a manifest defect of jurisdiction might have been made or committed by the authority. *Certiorari* would therefore still issue in the face of such an ouster clause but only for a manifest defect of jurisdiction, as the universally accepted rule is *'defectus potestatis nullitas nullitatem'.*

21 [1975] 2 M.L.J. 175.
22 (1874) L.R. 5 P.C. 417.
23 *Ibid,* at p. 442. Emphasis added.
24 *Per* Abdoolcader J., *op. cit.* n. 21 at p. 179.
25 [1978] 1 M.L.J. 144 at p. 146.

> The word 'jurisdiction' in the law and doctrine of procedure constitutes and connotes the juridical expression of the right and obligation of an authority on which the law confers jurisdictional functions of taking cognisance of and deciding matters within the limits of its attributes. Hence, 'defect of jurisdiction' means the authority's lack of power to take cognisance of and decide the matter which has been submitted to its decision. 'Manifest', as I said in *Mak Sik Kwong (No. 2)* means no less than self-evident or clear. The question of whether or not there is a manifest defect of jurisdiction will be one for consideration and determination on the particular circumstances of each case as it arises in the light of the principles discussed and postulated in my judgment in the case referred to, and the courts will accordingly have to be ready to sharpen their constitutional knives as and when the occasion demands.

A comparison of the views expressed by Abdoolcader J. and that of Lord Reid's in the *Anisminic* case reveals that there is no real difference in the two approaches. Abdoolcader J. expressed in positive terms those matters which must be established to show that the administrative body has not acted beyond its "jurisdiction". His Lordship uses the term "jurisdiction" in the narrow sense preferred by Lord Reid. Lord Reid does not deny the right of the tribunal to come to the wrong decision so long as it acts within its jurisdiction. It is conceded by Abdoolcader J. that if there is a "manifest defect of jurisdiction" then the ouster clause will be ineffective. "Manifest" is interpreted as being "no less than self-evident or clear". The examples postulated by Lord Reid which would render the decision of the tribunal a nullity are really examples of manifest defects of jurisdiction.[26]

Further, the word "manifest" is used by the Privy Council in *Willan's* case in the context of evidence that may be relied upon in challenging a decision of an administrative body which is protected by a "no *certiorari"* clause.

> (A)n adjudication by a judge having jurisdiction over the subject-matter is, if no defects appear on the face of it, to be taken as conclusive of the facts stated therein; and that the Court... will not on *certiorari* quash such an adjudication on the ground that any such fact, however essential, has been erroneously found.[27]

There is nothing in the judgment of the House of Lords in the *Anisminic* case which derogates from the above passage. Lord Reid's judgment in *Anisminic* indicates the sort of factors which would give rise to a defect on the face of the adjudication of the tribunal.

Abdoolcader J.'s view of the *Anisminic* case can further be qualified on the basis that *Willan's* case was concerned with a "no *certiorari"* clause whereas the *Anisminic* case was concerned with a wider clause. Different considerations prevail in applying an ouster clause which merely prevents the courts from giving a specific remedy as opposed to negating its right to supervise inferior tribunals altogether. The wider the ouster clause the more strictly it must be construed.

[26] In *Kannan* v. *Menteri Buruk & Tenaga Rakyat* [1974] 1 M.L.J. 90, Syed Othman J. seemed to accept the *Anisminic* approach.
[27] *Per* Sir Colville in *Colonial Bank of Australasia* v. *Willans* (1874) L.R. 5 P.C. 417 at p. 443.

Finally, the *Anisminic* case is the culmination of a process of evolution by the courts in formulating principles in accordance with which they will carry out their surveillance of administrative bodies. *Willan's* case was decided almost a century before the decision in the *Anisminic* case. During that period there has been a tremendous growth in the role of government in the everyday lives of people. Attempts by the executive to make themselves the final arbiters of matters which affect the rights of people must be kept under control. Whilst there is no inconsistency in law between *Willan's* case and the *Anisminic* case the latter case does recognise the role the judiciary must play under modern conditions. There has been such a proliferation of privative clauses in modern legislation that law reform bodies and Royal Commissions have recommended that such clauses be excluded from all legislation.[28] Failing a similar legislative policy in Malaysia the courts must play an effective role in keeping "big government" within reasonable restraint.

In the context of section 13 of the ICA the courts will certainly regard the Minister as having acted in excess of jurisdiction if he entertains an appeal on grounds other than those specified in section 13(1). The Minister must also take care to allow the manufacturer to make representations and take into account any new facts that have come into existence since the licensing officer made his decision. The Minister must consider the matter afresh and not simply rubber-stamp the decision of the licensing officer. The Minister must be free from any preconceived prejudices and act strictly in accordance with the purposes of the legislation. Although section 13(2) authorises the Minister to make such order as he deems fit that order must not be made for improper purposes.[29] In discussing the question as to the manner in which a Minister may exercise a discretion vested in him Lord Reid in *Padfield* v. *Minister of Agriculture Fisheries and Food* said:[30]

> Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act; the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the court. In a matter of this kind it is not possible to draw a hard and fast line, but if the Minister, by reason of his having misconstrued the Act or for any other reason, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the court.

Lord Reid then went on to consider whether the Minister could overcome a challenge to the exercise of his discretion by not giving reasons.

> I do not agree that a decision cannot be questioned if no reasons are given. If it is the Minister's duty not to act so as to frustrate the policy and objects of the Act, and if it were to appear from all the circumstances of the case that that has been the effect of the Minister's refusal, then it appears to me that the court must be entitled to act.[31]

28 See *e.g.* Franks Committee on Administrative Tribunals and Enquiries Cmnd. 218 (1957); Report from the Statute Law Revision Committee upon Appeals from Administrative Decisions, Victoria, (1967-68).
29 See also *supra* p. 414 *et. seq.*
30 [1968] 2 W.L.R. 925 at p. 941.
31 *Per* Lord Reid, *ibid,* at p. 944.

CONCLUSIONS

In spite of the broad and vague language used in the ICA it is clear that the Government could be faced with legal challenges should it act in a ham-fisted manner. However, legal challenges by businessmen are normally used in the last resort. A new manufacturer will prefer not to invest in Malaysia than to pursue expensive litigation. An existing manufacturer will toe the line as far as he can but if he finds Government action too burdensome he may simply let his operations run down and seek more favourable climes for his investment. There is little doubt that the ICA has dampened industrial development in the country. Since the enactment of the ICA in 1975 there has been a substantial falling off in the levels of investment in the country as evidenced by the number of approvals given by the Federal Industrial Development Authority (FIDA). In 1974, 525 new projects involving capital investments of about M$ 1,600 million were approved. In comparison, in 1976, only 425 new projects were approved with a capital investment of about M$ 1,200 million and in 1977 the figures were 400 new projects with a capital investment of M$882.6 million respectively.[32] Although other factors, particularly rescissionary trends throughout the world, may have contributed to the reduction in investment there is little doubt the ICA has been a major contributing factor. The feeling of the local business community, especially the Chinese, is reflected as follows:[33]

> There is considerable disquiet in the Chinese community particularly over the Industrial Co-ordination Act which, in theory at least, gives the civil service considerable power to intervene in the day-to-day running of businesses,
>
> To the Chinese, Government interference in their family companies is a very emotional issue. In many cases these have been built up from nothing over several generations
>
> They are the reward for enterprise and considerable hard work. A primary objective has been to provide attractive employment opportunities for family members.
>
> Now the Chinese feel they are being forced to give up part of their businesses and open their doors to outsiders.
>
> Although the Government does not admit it, Chinese businessmen have gone on a sort of investment strike.
>
> Money is being saved, moved overseas, or is fuelling a boom in housing construction, which is not covered by the Industrial Co-ordination Act.

In view of the general displeasure expressed against the ICA the question arises whether in fact the statute is necessary to achieve the objective for which it was enacted. The Government has available to it a whole range of legislation and administrative powers which it can invoke to secure compliance with its policies. The significant difference between using these powers and powers under the ICA is that the use of the powers in the former case requires the separate evaluation of the position of each manufacturer. Whilst the Government can act in accordance with stated policies it is not seen as acting heavy-handedly against the entire manufacturing sector. A brief

32 Federal Industrial Development Authority 1977 Annual Report pp. 167-171.
33 *The Age* Newspaper (Melbourne) *Special ASEAN Trade Feature,* Oct. 20, 1978, at p. 25.

summary of some of the various statutory and administrative powers Government can evoke will indicate their extent.[34]

Exchange Control Regulation

The Exchange Control Act 1953[35] vests in the Controller of Foreign Exchange the power to control dealings in foreign exchange and to make regulations. These include the regulation of remittance of funds abroad from Malaysia and the receiving of remittances of funds from overseas. Regulations have also been made governing the borrowing of money from local sources by foreign companies and the purchase and sale of securities in local companies by foreigners.

The regulations currently in force require that approval of the Controller be obtained before sums exceeding M$l million are remitted abroad from Malaysia. It makes no difference whether the remittance constitutes payment of capital, profits, dividends, interest or of royalties or fees for technical assistance.

The regulations do not indicate what considerations will be taken into account by the Controller in approving such remittances. The need to seek approval for remittances of returns on investment furnishes an opportunity to the Controller to evaluate whether the conditions laid down when the investment was made have been complied with. An overseas investor who has failed to comply with the conditions or has circumvented the controls may find that he cannot enjoy the fruits of his endeavours outside Malaysia. This opportunity can also be used to persuade a company to re-invest in Malaysia some of the profits made there.

All agreements relating to joint ventures, licensing of patents and provision of technical assistance by foreign interests to local interests must be approved by the Ministry of Trade and Industry, In vetting these agreements the Ministry seeks to ensure that the royalty payments do not exceed 2 to 3 per cent of the profits made by the local concern. The Ministry also takes into account the general policy on foreign investment when approving these agreements. Franchise agreements of this nature normally extend over a number of years. Once Ministry approval for the principal agreement is granted the Controller's approval for remittance of royalty payments overseas will be forthcoming each year. Although there is no legal requirement that such an agreement be submitted for approval to the Ministry, there is little doubt that without it the Controller of Foreign Exchange will not approve the remittance of royalties abroad of more than $1 million. This figure is easily exceeded in the case of the larger multinational concerns operating in Malaysia.

The exchange control regulations extend to the obtaining of loans from overseas as well. Before a foreign loan can be obtained, the

34 The ensuing discussion is adapted from *Credit and Security: Legal Problems of Development Financing in Malaysia* which is by J. Singh, D.E. Allan, M.E. Hiscock and D. Roebuck. The book is in the course of publication by the University of Queensland Press.

35 Revised 1969, Act 17.

resident borrower must get the permission of the Controller, who requires details of the loan including the amount, the currency of the loans, the rate of interest, the terms of repayment, the purpose of the loan and the name of the lender. This instrument of foreign exchange control enables the Controller to ensure that the terms of the loan are fair. In the case of loans by a foreign parent to a local subsidiary, the Controller can also make sure that the local company is not, by the need to repay loans, unduly milked of profits which would otherwise be subject to local tax.

A corollary to the restrictions on obtaining loans from abroad is control of credit facilities obtained locally by a company incorporated in Malaysia but controlled by non-residents. Non-resident control exists where 50 per cent or more of the paid-up capital is held by non-residents; or where the company is a branch of a company incorporated abroad; or where, even though there is a majority resident shareholding, control is exercised by non-residents. A non-resident controlled company seeking credit facilities exceeding M$500,000 from local financial institutions must obtain the permission of the Controller. Normally consent is freely granted for borrowings not exceeding the paid-up share capital. These controls are intended to prevent excessive competition from foreign controlled companies for credit facilities which would otherwise be available to local businesses. Subsidiaries of multinationals controlled from abroad have a competitive edge over local concerns for credits simply because they can offer better collateral, namely guarantees from the parent.

Although exchange control regulations currently operating in Malaysia are liberal and require no more than the filling in of forms with approval following automatically, nevertheless the potential for stricter regulation is there. Wide discretion is vested in the Controller where it really matters, when the sums involved are large. In practice the Controller gives his approval freely. What matters is that where his approval is needed he has an opportunity to obtain the necessary information from the applicant to ensure compliance with conditions laid down and with government policy. There is no doubt that exchange control regulation has always been an effective weapon for the government. Investors take exchange control seriously because it affects them after the investment has been made. Failure to comply with the conditions laid down by government at the start of the project can prove expensive when the profits cannot be exported. Foreign exchange regulation is therefore an extremely effective device for keeping a foreign investor or a local investor who has to import technology or export goods in line.

Control over Registration of Businesses and the Raising of Capital

There are three basic legal forms of business: sole proprietorships, partnerships and companies. Only companies need to be registered to exist. Only a company has a legal existence separate from that of its shareholders and managers, which enables its members to take the advantage of limiting their liability. Nearly all manufacturing is done by companies. Only the small back-street manufacturer or cottage industry is still run as a sole proprietorship or partnership.

To incorporate a company its promoters must first reserve a name for the company and then lodge with the Registrar of Companies the memorandum and articles of association and such other documents as are prescribed by the Companies Act 1965.[36] If the proposed company is a private one there are no further formalities. If the company is to be registered as a public company then there are further controls. A public company having a share capital but not inviting the public to subscribe for shares in the company is required to lodge a statement in lieu of prospectus with the Registrar before it can commence business.[37] The contents of a statement in lieu of prospectus are prescribed in the Act and the Registrar 'shall not accept for registration any statement in lieu of prospectus unless it appears to him to comply with this Act.'[38]

If a public company wishes to invite the public to subscribe for shares, a full prospectus, which has been registered, must be issued.[39] The Act lays down in considerable detail the requirements of a prospectus, which even cover such matters as the size of print.[40] Furthermore, the Registrar is directed not to register a prospectus if it contains 'any statement or matter which is in his opinion misleading in the form and context in which it is included'.[41] This direction, coupled with the detailed requirements relating to the contents, will enable the Registrar to put effective obstacles in the path of an entrepreneur who seeks to set up a project without having first obtained the consent of the government. If the entrepreneur wishes to obtain a Kuala Lumpur Stock Exchange listing for the shares issued to the public, the prospectus will also have to satisfy the requirements of the Stock Exchange. All this could result in a long drawn out battle with a great deal of publicity which could undermine public confidence in the shares. Most businessmen seek to avoid such conflicts and publicity.

The government has set up two interdepartmental committees to help the businessman who is prepared to co-operate. The first of these, the Capital Issues Committee (CIC), is made up of representatives from the Central Bank, the Stock Exchange, the Registrar of Companies, the Ministry of Trade and Industry, the Treasury and private industry. Its secretary is the financial adviser of the Central Bank, which serves as its secretariat. Any issue of shares by a public company (other than bonus issues out of retained profits), including private placements, rights issues, and issues of debentures, must first be approved by the CIC. Any application for quotation on the Stock Exchange must also be approved. The CIC will consider the merits of the issue, whether or not the company's proposal complies with government policy, whether or not appropriate reservations for *bumiputras* have been made, whether the premium proposed (if any) is justifiable and what impact the issue will have on the share market as a whole. The CIC acts as a watchdog for the investing public

36 Revised 1973, Act 125, s. 16(1).
37 *Ibid.* s. 52(2)(a).
38 *Ibid.* s. 51.
39 *Ibid.* s. 37(1) and s.42(1).
40 *Ibid.* s. 39.
41 *Ibid.* s.42(2).

and for the government. The public can be sure, once the CIC has approved an application, that the company is basically sound, that its management is of a high standard, and that it is making a substantial contribution to the economic and social well-being of the country.

The second committee is the Foreign Investments Committee (FIC),[42] comprised entirely of representatives of government departments and agencies. The FIC is a limb of the Prime Minister's department, the chairman being the Special Economic Adviser to the Prime Minister. It includes the Secretary-General of the Treasury, the Governor of the Central Bank, the Director-General of the Economic Planning Unit (EPU), the Secretary-General of the Ministry of Trade and Industry, the Chairman of FIDA and the Registrar of Companies. The terms of reference of the FIC include supervisory, advisory, monitoring and regulatory functions. It is responsible for formulating policy guidelines on foreign investment to secure compliance with the NEP; monitoring the progress of foreign private investment, helping foreign investors with their difficulties and recommending suitable investments; supervising and advising the government and government agencies on all matters of foreign investment; monitoring, assessing and evaluating the form, extent and conduct of foreign investment in the country and maintaining comprehensive information on foreign investment; and co-ordinating and regulating the acquisition of assets or any interests, mergers and take-overs of companies and businesses in Malaysia. It is the last of these functions that brings an investor, especially a foreign investor, within the regulatory functions of the FIC.

The title FIC is something of a misnomer, because it also supervises local businesses. The last term of reference above covers three main areas: (i) the acquisition of substantial fixed assets in Malaysia by foreign interests; (ii) any bids to take over or to merge with local companies, including any arrangement whereby the assets or a substantial portion of the voting power in a Malaysian company pass into the hands of foreign interests; (iii) arrangements which affect the control of Malaysian companies through management agreements, technical assistance agreements or other joint-venture agreements. Malaysian concerns are brought within the ambit of the FIC under (ii) above, which covers bids by Malaysian interests for a Malaysian company. Furthermore, it would appear that Malaysian or foreign interests seeking to acquire any assets or interests in excess of M$l million must also obtain the consent of the FIC.

It is patent that discerning use of the powers under the Companies Act will be extremely effective in obtaining compliance with Government policy. These powers are exercised in consultation and under the direction of the CIC and FIC. Although the CIC and FIC are *de facto* bodies and wield no special powers under the law, yet, by virtue of their composition and their terms of reference they can summon the entire resources of Government in obstructing or assisting a manufacturer. Indeed it is through pressures being exerted through the FIC that existing foreign companies in Malaysia are beginning

[42] This discussion on the FIC is based on information distributed by the FIC pertaining to its guidelines and functions.

to Malaysianise. This clearly shows that the big stick of legislation such as the ICA is not really needed. Discreet application of pressure is extremely effective whilst at the same time it does not create undue fears of excessive interference in the conduct of business as does the ICA.

Tax Incentives[43]

The Investment Incentives Act 1968[44] provides for the grant of tax relief to manufacturing enterprises through five schemes.

The most favourable treatment is obtained under the Pioneer Status scheme. Pioneer Status may be obtained where a particular industry has been declared a pioneer industry or a particular product has been declared a pioneer product. A manufacturer obtaining pioneer status can obtain a tax holiday for up to eight years and in addition obtains certain anciliary tax benefits which can be utilised after the tax holiday period has expired. The Pioneer Status scheme is intended to encourage development in those areas of manufacturing activity regarded as being especially desirable by the government.

To encourage manufacturers to establish labour intensive industries a Labour Utilization Relief is available. A tax holiday for up to eight years is also available under this scheme in addition to the other perks that are available under the Pioneer Status scheme.

The third scheme, the Locational Incentive scheme is designed to encourage manufacturing enterprises to move into the lesser developed parts of the country. A tax holiday for up to 10 years is available under this scheme. The basis of the grant of the period of relief depends, apart from the place where the factory is set up, on a combination of the factors under Pioneer Status and Labour Utilisation Scheme, *i.e.,* amount of capital investment or number of employees.

Under the fourth scheme, Investment Tax Credit, the investor is allowed a credit expressed as a percentage of his capital investment in a given year, that is set-off against his income for that year. That amount of income is then free from tax. The maximum amount of credit available is 40% of capital investment. No minimum amount of capital investment or employment levels is required. All that is needed is approval from the Ministry of Trade and Industry.

The final scheme is designed to promote exports from Malaysia. The Export Incentive scheme provides for three types of tax incentives, namely, (i) double deductions for export promotion expenses; (ii) accelerated depreciation allowances for companies exporting at least 20% of their total production in respect of capital expenses incurred in modernising the factory or plant and machinery; (iii) export allowance which goes to reduce the gross income of the manufacturer by the specified percentage where the manufacturer's export record shows improvement.

[43] For a fuller discussion of these see *op. cit.* n. 34, Appendix I.
[44] Revised 1978, Act 199.

Other tax incentives are available in the form of tariff assistance, *i.e.,* relief from import duties; increased capital allowances which are granted to manufacturers who modernise their factory but are not granted any of the other reliefs; and finally a special incentive available to hotels only.

The range of tax incentives is available to both new and existing manufacturers. In granting an incentive the Government imposes conditions which promote national economic and social objections. In keeping with the principle of orderly development of manufacturing activities an incentive will not be granted where a particular field is already over-crowded. A manufacturer who does not want any of the various tax incentives can of course avoid the controls that he will be subjected to if he does obtain tax relief. However, any manufacturer investing a large sum of money will seek to obtain any tax relief he can to maximise his return on capital. Whilst the availability of tax incentives may not be the dominating factor in deciding whether or not to make the investment it is certainly a factor of some importance.

Other Miscellaneous Controls

The Government has in its armoury in keeping a surveillance over manufacturing activities a whole array of other statutes. These statutes give the Government direct and indirect powers in controlling *inter alia* manufacturing activities. For example powers under the Immigration Act 1959-63 [45] can be exercised to refuse entry to expatriate personnel required by a manufacturer who has failed to comply with Government policy. Powers under the Employment Restriction Act 1968 [46] can be invoked to require manufacturers to employ certain percentages of the different racial groups in the country. Indirect controls can be exercised through the Central Bank Ordinance, 1958 [47] and the Banking Act 1973 [48] so as to restrict access to credit facilities.

The use of this array of powers has not given rise to the emotional outburst that has arisen against the ICA. The effectiveness of the various powers the Government has can be seen from the fact that manufacturers were already stepping into line with Government policy even before the ICA was enacted. All that is needed is a more streamlined bureaucratic machinery and the establishment of an information bank about manufacturers to enable the more effective use of the pre-existing powers. The ICA is a misconceived and ill-drafted statute. Harsh exercise of the powers under the ICA is constitutionally suspect and subject to legal challenge under principles of administrative law. It is submitted that the ICA must be repealed.

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45 Revised 1975, Act 155.
46 Act 36 of 1968.
47 Act 61 of 1958.
48 Act 102.

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